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No. 09-11556

IN THE

Supreme Court of the United States

JOSE TOLENTINO,

Petitioner,

v.

STATE OF NEW YORK,

Respondent.

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF NEW YORK

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether identity-related government records, such as those maintained by the Department of Motor Vehicles, accessed as the direct and immediate result of a Fourth Amendment violation, are subject to the exclusionary rule, and whether the New York Court of Appeals erred by categorically exempting all such fruits from Fourth Amendment suppression irrespective of the nature or magnitude of the underlying police misconduct?

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the New York Court of Appeals is published at 14 N.Y.3d 382. J.A. 99a-112a. The opinion of the New York State Supreme Court, Appellate Division, First Department is published at 59 A.D.3d 298. J.A. 96a-98a. The opinion of The New York State Supreme Court, New York County, explaining the summary denial of petitioner's motion to suppress is unpublished. J.A. 79a.

JURISDICTION

The judgment of the New York Court of Appeals was entered on March 30, 2010. The petition for writ of certiorari was filed on June 23, 2010. This Court granted the petition on November 15, 2010. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourth Amendment to the United States Constitution provides, in relevant part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." The Fourteenth Amendment to the United States Constitution provides, in relevant part: ". . . nor shall any State deprive any person of . . . liberty . . . without due process of law."

Section 511(3)(a)(ii) of the New York Vehicle and Traffic Law, provides: "A person is guilty of the offense of aggravated unlicensed operation of a motor vehicle in the first degree when such person . . . commits the offense of aggravated unlicensed operation of a motor vehicle in the third degree as defined in subdivision one of this section; and is operating a motor vehicle while such person has in effect ten or more suspensions, imposed on at least ten separate dates for failure to answer, appear or pay a fine, pursuant to subdivision three of section two hundred twenty-six of this chapter or subdivision four-a of section five hundred ten of this article."

Section 511(1)(a) of the New York Vehicle and Traffic Law provides: "A person is guilty of the offense of aggravated unlicensed operation of a motor vehicle in the third degree when such person operates a motor vehicle upon a public highway while knowing or having reason to know that such person's license or privilege of operating such motor vehicle in this state or privilege of obtaining a license to operate such motor vehicle is suspended, revoked or otherwise withdrawn by the commissioner."

STATEMENT OF THE CASE

For nearly half a century, this Court has applied the exclusionary rule in state criminal prosecutions where the government seeks to rely on evidence it obtained as a direct result of culpable, unconstitutional law enforcement conduct. In this case, the police stopped petitioner while he was driving and as a result of this stop learned that petitioner was driving with a

suspended license. When the State thereafter charged petitioner with one count of aggravated unlicensed operation of a motor vehicle in the first degree, in violation of New York Vehicle and Traffic Law (V.T.L.) §511(3)(a)(ii), petitioner filed a motion for a *Mapp* hearing, in which he sought to suppress the Department of Motor Vehicle (DMV) records discovered by the police as fruit of the car stop. Although petitioner alleged that the car stop was not supported by reasonable suspicion or probable cause or any other legal justification, the New York County Supreme Court, assuming petitioner's allegations to be true, denied petitioner's motion without an evidentiary hearing, concluding that petitioner did not possess a legitimate expectation of privacy in the DMV records and that such records are not suppressible under a fruit-of-the-poisonous-tree analysis. The New York State Supreme Court, Appellate Division, First Department, agreed with the latter conclusion. A divided New York Court of Appeals affirmed, holding that the exclusionary rule was inapplicable because the DMV records were accessed through reference to petitioner's identity and because they were contained in pre-existing government files. This decision breaks from this Court's longstanding practice of applying the exclusionary rule where the State seeks to rely on evidence it obtained as a direct product of a Fourth Amendment violation.

1. On January 1, 2005, around 7:40 p.m., Police Officer Ronald Marto observed petitioner driving a motor vehicle near the intersection of West 181st Street and Broadway in New York County. J.A. 4a-5a, 8a-9a. After pulling petitioner over and obtaining identifying information from him, the officer performed a DMV database search that revealed that petitioner's license

had been suspended for failure to answer summonses and had not been reinstated. J.A. 5a. He was indicted on one count of aggravated unlicensed operation of a motor vehicle in the first degree, in violation of V.T.L. §511(3)(a)(ii). J.A. 7a.

2. As part of petitioner's omnibus motion in the New York County Supreme Court, he moved to suppress his DMV records; alternatively, he asked the Supreme Court to hold a *Mapp* hearing. J.A. 17a-18a. Petitioner alleged that the car and petitioner were "seized when the police stopped the car." J.A. 28a. Petitioner asserted that he "was operating the motor vehicle in accordance with all posted traffic laws," that he had not "commit[ted] any traffic infraction that would have given the police cause to stop his vehicle," and that the car stop was unsupported by "reasonable suspicion, probable cause, or any other legal justification." J.A. 26a-27a.

In even more detail, petitioner alleged that:

> [o]n the day of the defendant's warrantless seizure and arrest by the police and on the day of the alleged incident, he had not been engaged in any unlawful or suspicious conduct. He had not been driving in an erratic, dangerous or otherwise unlawful manner, nor was there anything illegal about the condition of his automobile. Additionally defendant was not playing his radio at an unlawfully high volume. Moreover, any contrary information was not communicated to the police by a reliable source with personal knowledge. The defendant specifically challenges the

> reliability and basis of knowledge of any informant who may have transmitted information to the police.

J.A. 35a.

The motion further argued that petitioner's DMV records were the suppressible fruit of a Fourth Amendment violation because they were only accessible as a result of petitioner's unlawful seizure. J.A. 27a-29a. The motion explained that a vehicle must be stopped and the driver's name or license number must be obtained before DMV driving records can be generated. J.A. 32a-33a. The motion reasoned that "[a]lthough the DMV records which form the basis for this prosecution were in existence in computerized form prior to the defendant's arrest," the records are nonetheless subject to suppression because the police were only able to discover these records "as a direct result of the defendant's illegal street stop and subsequent arrest." J.A. 32a.

The prosecution opposed petitioner's suppression motion on the ground that "even if defendant was illegally stopped, apprehended, or arrested, defendant's identity and the documents from DMV are not subject to the exclusionary rule" because they "were in the possession of a public agency before the defendant was stopped, apprehended, and/or arrested." J.A. 70a, 72a.[1]

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1. The prosecution also opposed the motion on the ground that the stop was supported by probable cause. J.A. 69a-70a.

On July 12, 2005, the New York County Supreme Court denied petitioner's request for suppression of the DMV records and for a *Mapp* hearing. The court held that "[a]n individual does not possess a legitimate expectation of privacy in files maintained by the Department of Motor Vehicles and such records do not constitute evidence which is subject to suppression under a *fruit of the poisonous tree* analysis" (emphasis in original). J.A. 79a. On August 3, 2005, petitioner pleaded guilty to the sole count in the indictment, J.A. 90a-91a; on September 28, 2005, the Supreme Court sentenced him to five years of probation and a $500 fine. J.A. 94a-95a.

3. Petitioner appealed from the judgment of conviction, and in his appeal, argued that the motion court had erred in summarily denying his suppression motion. On February 24, 2009, the New York State Supreme Court, Appellate Division, First Department affirmed the judgment. J.A. 96a-98a. The appellate court disagreed with the suppression judge's conclusion concerning standing, holding that a defendant need not establish a privacy interest in "an alleged fruit of a preexisting violation of his or her Fourth Amendment rights." J.A. 97a. Nonetheless, the court concluded that DMV records were not "suppressible fruits" because they were akin to petitioner's identity, which it concluded was not suppressible. J.A. 97a. The court also held that the records were not suppressible because they "were compiled independently" of petitioner's arrest. J.A. 97a.

4. On March 30, 2010, the New York State Court of Appeals, by a vote of five-to-two, affirmed the Appellate

Division decision, holding that suppression of evidence was unavailable "when the only link between improper police activity and the disputed evidence is that the police learned the defendant's name." J.A. 106a.

The majority premised its decision on language in *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1039-40 (1984), that "the 'body' or identity of a defendant . . . in a criminal . . . proceeding is never itself suppressible as a fruit of an unlawful arrest," which it interpreted as creating a categorical exception to the exclusionary rule for all identity-related evidence. The majority concluded that "[a] contrary holding would 'permit[] a defendant to hide who he is [and] would undermine the administration of the criminal justice system.'" J.A. 101a-102a (citing *United States v. Farias-Gonzalez*, 556 F.3d 1181, 1187 (11th Cir. 2009)) (internal quotation marks omitted). The court examined federal circuit court decisions interpreting *Lopez-Mendoza* and holding that pre-existing government immigration files are not subject to suppression. The court approved the reasoning underlying those decisions that "there is no sanction . . . when an illegal arrest only leads to discovery of the man's identity and that merely leads to the official file or other independent evidence. (citing *United States v. Guzman-Bruno*, 27 F.3d 420, 422 (9th Cir. 1994) (citation and internal quotation marks omitted)." J.A. 103a. Then, it compared the discovery of alien records at issue in the circuit court cases with the discovery of petitioner's DMV records and concluded that "[t]he facts [were] analogous." J.A. 103a.

Although the majority made clear that this did not form "an independent basis" for its decision, it

interpreted language from *United States v. Crews*, 445 U.S. 463, 475-77 and 475 n. 22 (1980) (plurality) ("[t]he exclusionary rule . . . does not reach backward to taint information that was in official hands prior to any illegality") to further justify its decision eliminating the exclusionary rule sanction for petitioner, since DMV records are "public records already in the possession of authorities." J.A. 103a.

The court opined that applying the exclusionary rule in cases involving identity-related evidence would engender "great" social costs, "since permitting defendants to hide their identity would undermine the administration of the criminal justice system and essentially allow suppression of the court's jurisdiction," whereas it would generate only "few deterrence benefits" since "identity-related evidence is not unique evidence" so that the "true effect" of application of the rule would be "merely to postpone a criminal prosecution," J.A. 105a (citing *Farias-Gonzalez*, 556 F.3d at 1189), and since "[other] evidence recovered in the course of an illegal stop remains subject to the exclusionary rule." J.A. 105a.

Finally, the court attempted to harmonize its decision with this Court's decisions in *Davis v. Mississippi*, 394 U.S. 721, 724 (1969) and *Hayes v. Florida*, 470 U.S. 811, 815 (1985), which had authorized the suppression of fingerprint identity evidence. To do this, the New York court distinguished the defendants in *Davis* and *Hayes* from petitioner on two grounds: first, the defendants in *Davis* and *Hayes* were stopped so that police could obtain evidence that was not pre-existing (fingerprints), and second, the fingerprint evidence was being used to

"establish[] defendants' 'identities' as the perpetrators, but not their 'identities' in the sense relevant here." J.A. 106a. Because of these supposed differences, the New York court concluded that its decision was in harmony with *Davis* and *Hayes* and would not "alter the outcome" of those cases. J.A. 106a.

The dissent rejected the majority's main argument, concluding that it "relie[d] heavily on a misreading of *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984)." J.A. 107a. The majority decision, it concluded, failed to recognize that the language from *Lopez-Mendoza* that "[t]he 'body' or identity of a defendant" was never "suppressible as a fruit of an unlawful arrest" referred only to the court's power to assert jurisdiction over an individual and not to the admissibility of identity-related evidence at a proceeding conducted pursuant to that jurisdiction. J.A. 108a. The dissent had no quarrel with the majority's conclusion that a defendant's identity cannot be suppressed to defeat the jurisdiction of the court. The dissent, however, emphasized that there was a clear difference between identity for jurisdictional purposes and identity-related evidence that, the dissent maintained, was subject to suppression. J.A. 109a.

The dissent concluded that there was no justification for creating an exception to the exclusionary rule for DMV records obtained by the police through exploitation of an unlawful traffic stop. The majority was, in effect, excluding a specific category of evidence from the exclusionary rule's ambit, something that the court had never done before. J.A. 107a. As demonstrated by this Court's decisions in *Davis* and *Hayes*, however, where fingerprints — "paradigmatic identity evidence"

— were found suppressible, "[f]ruit of the poisonous tree may be anything 'of evidentiary value.'" J.A. 107a, 109a. Accordingly, "identity-related evidence can and should be subject to the exclusionary rule." J.A. 109a. The dissent noted that the Fourth, Eighth and Tenth Circuits shared its view, J.A. 108a, citing *United States v. Oscar-Torres*, 507 F.3d 224, 227-30 (4th Cir. 2007); *United States v. Olivares-Rangel*, 458 F.3d 1104, 1111-1112 (10th Cir. 2006); and *United States v. Guevara-Martinez*, 262 F.3d 751, 753-55 (8th Cir. 2001).

The dissent maintained that the deterrent purpose of the exclusionary rule applied to identity-related evidence, and that "the legality of the police conduct" should be the focus of the inquiry, "not the type of evidence obtained." J.A. 110a. Creating an exception to the exclusionary rule for driving records would, the dissent cautioned, encourage Fourth Amendment violations because it "gives law enforcement an incentive to illegally stop, detain, and search anyone for the sole purpose of discovering the person's identity and determining if it matches any government records accessible by the police." J.A. 110a.

The dissent also rejected the conclusion that DMV records are not subject to suppression because they are government records compiled independently of a defendant's arrest. This argument was flawed because it "ignore[d] that the police located these specific records only by relying on identifying information that may have been the product of an illegal stop." J.A. 110a.

SUMMARY OF ARGUMENT

Shortly after 7:30 p.m. on January 1, 2005, the police stopped petitioner while he was driving, learned his identity during the stop, used his identity to gain access to his DMV records, and discovered that he was driving with a suspended license. When petitioner moved to suppress the DMV records, he alleged that the police seized him without any trace of justification — a random, baseless stop long disapproved by this Court. *See Delaware v. Prouse*, 440 U.S. 648 (1979). The New York Court of Appeals assumed petitioner's allegations to be true but concluded that, irrespective of the nature or magnitude of the underlying police misconduct in a particular case, DMV records were categorically immune from suppression as the fruit of the poisonous tree because of the identity-related nature of those records. But a random, baseless stop is the paradigm of deliberate unconstitutional police conduct that the exclusionary rule was designed to deter, and the New York Court of Appeals' categorical exemption of DMV records from the exclusionary rule would invite bold disregard for the Constitution.

1. The primary purpose of the exclusionary rule is to discourage unconstitutional police conduct. *See, e.g., Davis v. Mississippi*, 394 U.S. 721, 724 (1969) ("[t]he exclusionary rule was fashioned as a sanction to redress and deter overreaching governmental conduct prohibited by the Fourth Amendment"). It remains the "general rule in a criminal proceeding that . . . evidence obtained as a result of an unlawful warrantless arrest [is] suppressible if the link between the evidence and the unlawful conduct is not too attenuated." *INS v.*

Lopez-Mendoza, 468 U.S. 1032, 1040-1041 (1984). Honoring that general rule, this Court has held that nearly every type of evidence is subject to suppression as the fruit of a Fourth Amendment violation, so long as the knowledge of the evidence was obtained by "exploitation" of the police illegality. *Wong Sun v. United States*, 371 U.S. 471, 488 (1963) (citation omitted). Moreover, although a defendant must demonstrate a sufficient privacy interest to challenge an unlawful search or seizure, a defendant need not establish any expectation of privacy regarding the evidence to be suppressed as a fruit of the illegality. *See id.* at 484, 486-88.

This Court has never exempted identity-related evidence from the exclusionary rule. What this Court has held is that the exclusionary rule cannot be used to deprive courts of jurisdiction by allowing a criminal defendant himself to become a suppressible "fruit." *See INS v. Lopez-Mendoza*, 468 U.S. 1032; *Gerstein v. Pugh*, 420 U.S. 103, 119 (1975); *Frisbie v. Collins*, 342 U.S. 519 (1952); *Ker v. Illinois*, 119 U.S. 436 (1886). In petitioner's case, the New York Court of Appeals relied heavily on *Lopez-Mendoza* to justify its conclusion that the exclusionary rule does not apply to identity-related evidence. But the jurisdictional doctrine at issue in *Lopez-Mendoza* simply supports the proposition that the exclusionary rule is limited to evidentiary matters and is consistent with this Court's suppression of prototypical identity-related evidence. *See Davis v. Mississippi*, 394 U.S. at 723-34 (suppressing fingerprints as fruit of Fourth Amendment violation) and *United States v. Crews*, 445 U.S. 463 (1980) (approving the suppression of photographs and pre-trial identifications as fruit of Fourth Amendment violation).

This Court long ago recognized the impropriety of suspicionless stops designed to ascertain an individual's identity, *see Brown v. Texas*, 443 U.S. 47 (1979), and has specifically applied this rule to car stops. *Delaware v. Prouse*, 440 U.S. 648. But the New York Court of Appeals' systematic exemption of identity-related records from the exclusionary rule would eliminate deterrence when it is most needed and would strongly encourage the police to violate the very principles at issue in *Brown* and *Prouse*.

II. The independent source doctrine, originally articulated in *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920), establishes that if the police gain knowledge of or access to evidence independently of an illegal search or seizure, the exclusionary rule does not prohibit its introduction at a criminal trial. Its purpose is to ensure that the police are "put[] . . . in the same, not a *worse*, position tha[n] they would have been in if no police error or misconduct had occurred." *Murray v. United States*, 487 U.S. 533, 537 (1988)(citation omitted) (emphasis in original).

Here, the independent source doctrine does not operate, since the police did not ascertain that petitioner's license had been suspended by means independent of the unlawful seizure. They discovered that information only by capitalizing on their unlawful detention of petitioner to learn his identity as the driver of the car. Without the knowledge directly gained from the illegal stop, the police had no reason to examine petitioner's DMV records. The suppression of the DMV records will not put the police in a worse position than they would have been in absent the illegality. The police

would simply be unable to use the evidence they discovered as a direct and immediate result of their illegal conduct. The operation of the exclusionary rule would not bar the State from prosecuting petitioner for unlicensed driving on the occasion at issue if they obtained evidence of his unlicensed driving independent of the unlawful stop.

The New York Court of Appeals' reliance on *United States v. Crews*, 445 U.S. 463, to support its conclusion that the DMV records here were independently obtained and thus not subject to the exclusionary rule does not withstand scrutiny.

In *Crews*, the authorities possessed evidence connecting the defendant to the crime before the illegal seizure even occurred. In contrast, the police accessed petitioner's DMV records as a direct result of the illegal stop, and those records had absolutely no evidentiary significance until and apart from that stop. Hence, the mere fact that the State DMV database had contained those records provides no justification for immunizing the Fourth Amendment violation that gave the information inculpatory value.

III. This Court applies the exclusionary rule "where its deterrence benefits outweigh its 'substantial social costs'". *Pennsylvania Bd. of Probation and Parole v. Scott*, 524 U.S. 357, 363 (1998) (quoting *United States v. Leon*, 468 U.S. 897, 907 (1984)). To be applicable the rule must "'result in appreciable deterrence.'" *Leon*, 468 U.S. at 905-906 (citation omitted).

If police could conduct arbitrary, suspicionless car stops to ascertain an individual's identity – the conduct expressly condemned in *Prouse* – they would have a strong incentive to do so. The temptation to circumvent the protections of the Fourth Amendment is precisely the same powerful incentive the police have to discover evidence of criminality in the classic exclusionary rule scenario. *See Hudson v. Michigan*, 547 U.S. 586, 596 (2006) ("The value of deterrence depends upon the strength of the incentive to commit the forbidden act.").

As a close analog to deterrence, this Court focuses on the culpability of the police actions that are potentially subject to the exclusionary rule. *Herring v. United States*, 129 S. Ct. 695, 701 (2009). "The extent to which the exclusionary rule is justified by . . . deterrence principles varies with the culpability of the law enforcement conduct." *Id.*

Because the New York Court of Appeals categorically concluded that the DMV records could never be the fruit of the poisonous tree, the records would not be suppressible under the New York rule regardless of the flagrancy of the police misconduct. Thus, under the approach of the New York Court of Appeals, the DMV records would not be suppressible even in the face of deliberate and/or systemic violations of the Fourth Amendment.

The cost of applying the exclusionary rule in any case is substantial. *Lopez-Mendoza*, 468 U.S. at 1041; *see Herring*, 129 S. Ct. at 701. Nonetheless, the general rule in a criminal case is that, absent attenuation, evidence obtained as a result of an unlawful search or

seizure is suppressible. Accordingly, in weighing the costs of applying the rule against the benefits in particular situations, the Court has focused on costs beyond those typically associated with the operation of the rule. *See, e.g., Hudson*, 547 U.S. at 595.

Application of the exclusionary rule to the DMV records in petitioner's case implicates only ordinary costs, endemic to the rule's operation. Petitioner's case involves a traditional single-act offense in which the rule would not function to insulate future misconduct. Further, application of the exclusionary rule here would not lead to unfamiliar suppression litigation and would not create new dangers to officers in the field. *See Hudson*, 547 U.S. at 595-596. Finally, the State would still possess an array of alternative methods to enforce the traffic laws against unlicensed drivers. *See Prouse*, 440 U.S. at 659-63.

Under these circumstances, because the benefits outweigh the costs, application of the exclusionary rule is required.

ARGUMENT

I. WHEN THE POLICE, ABSENT REASONABLE SUSPICION OR PROBABLE CAUSE, STOP AN INDIVIDUAL AND ACQUIRE IDENTITY-RELATED EVIDENCE, THE TRADITIONAL REMEDY OF EXCLUSION APPLIES TO THAT EVIDENCE.

The police pulled over petitioner's car in a traffic encounter that the New York courts presumed, in resolving his suppression claim, was supported by neither the requisite reasonable suspicion nor probable cause and could, in fact, have been entirely random or even invidious. The officers then obtained identifying information from petitioner and, immediately thereafter, checked the computer records of the DMV, which led to their discovery that his license had been suspended. Following petitioner's arrest and indictment, a state trial court justice denied his motion to suppress without a hearing, concluding that, even if the stop violated petitioner's Fourth Amendment rights, the exclusionary rule did not apply to such identity-related fruits as petitioner's DMV records. This determination, eventually upheld by a divided New York Court of Appeals, misconstrues this Court's Fourth Amendment jurisprudence. An examination of the relevant authority demonstrates that there is no reason why the exclusionary rule should not apply to the direct products of an unlawful traffic stop.

There is no legitimate argument here that the discovery of the suspension was attenuated from the stop, or that the data in the DMV computer network

revealing the suspension would have been otherwise accessed or had any evidentiary value without the police ascertainment of petitioner's identity as a direct result of the stop. The deterrence value of the exclusionary rule in this context is therefore particularly strong: this Court's recognition of the impropriety of suspicionless traffic stops explicitly seeks to deter police from detaining motorists for the purpose of obtaining their licenses or other identifying information, precisely the intrusion at issue here. *See Delaware* v. *Prouse*, 440 U.S. 648 (1979). Accordingly, assuming the illegality of the stop as the New York courts did, petitioner should be entitled to suppression of the direct fruit of that unlawful seizure: the information in DMV files that his license had been suspended.

A. Under the Fourth Amendment, a Police Officer who Lacks Reasonable Suspicion or Probable Cause May Not Stop an Individual to Obtain Identity-Related Information.

This Court long ago recognized that suspicionless stops by law enforcement to obtain identity-related evidence violate the Fourth Amendment. In *Delaware v. Prouse*, 440 U.S. 648, the State, citing its strong interest in ensuring public safety on the roads, urged this Court to approve discretionary automobile stops, in the absence of any suspicion, for the purpose of determining whether the driver possessed a valid license. *Id.* at 658. The Court flatly declined the invitation, holding that such stops violate the Fourth Amendment unless the police have "reasonable suspicion that a motorist is unlicensed or that an

automobile is not registered." *Id.* at 663. In so holding, this Court reasoned that "[t]o insist neither upon an appropriate factual basis for suspicion directed at a particular automobile nor upon some other substantial and objective standard or rule to govern the exercise of discretion 'would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches . . .'" *Id.* at 661 (quoting *Terry v. Ohio*, 392 U.S. 1, 22 (1968)). "This kind of standardless and unconstrained discretion is the evil the Court has discerned when in previous cases it has insisted that the discretion of the official in the field be circumscribed, at least to some extent." *Id.*

A similar analysis animated the Court's decision in *Brown v. Texas*, 443 U.S. 47 (1979), where Texas sought to prosecute Brown for violating a provision of the state penal code that made it a crime for individuals to refuse to identify themselves when stopped by the police. *Id.* at 48-49. The arresting officer acknowledged that he stopped Brown "to ascertain his identity." *Id.* at 52. Although Brown refused to provide it, the Court, finding that the police lacked reasonable suspicion for the stop, unanimously concluded that his prosecution was constitutionally infirm: "even assuming that [crime prevention] is served to some degree by stopping and demanding identification from an individual without any specific basis for believing he is involved in criminal activity, the guarantees of the Fourth Amendment do not allow it." *Id.*; *cf. Hiibel v. Sixth Judicial District Court of Nevada*, 542 U.S. 177, 188 (2004) ("A state law requiring a suspect to disclose his name *in the course of a valid Terry stop* is consistent with the Fourth

Amendment prohibitions against unreasonable searches and seizures.") (emphasis added).[2]

Given the Court's recognition in *Prouse* and *Brown* that suspicionless intrusions to acquire identity-related evidence offend the Fourth Amendment, it would be anomalous indeed to conclude that these very fruits could form the basis of a criminal prosecution against petitioner irrespective of the legality of the automobile stop that led directly to their discovery. But there is no such anomaly: a review of this Court's precedents demonstrates that the exclusionary rule fully applies to these evidentiary fruits.

B. Exclusion Remains the Appropriate Remedy for Evidence Obtained as the Direct Result of an Illegal Intrusion.

It remains the "general rule in a criminal proceeding that statements and other evidence obtained as a result of an unlawful warrantless arrest are suppressible if the link between the evidence and the unlawful conduct is not too attenuated." *INS* v. *Lopez-Mendoza*, 468 U.S. 1032, 1040-41 (1984); *see Hudson v. Michigan*, 547 U.S. 586, 603 (2006) (Kennedy, J., concurring in part and concurring in the judgment) (stating that "the continued operation of the exclusionary rule, as settled and defined by our precedents, is not in doubt"). Exclusion of such

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2. As these decisions establish, the New York Court of Appeals erred when it declared categorically that "[t]he Constitution does not prohibit the government from requiring a person to identify himself to a police officer." J.A. at 105a. Absent reasonable suspicion, such conduct is unconstitutional.

evidence is necessary to vindicate citizens' core constitutional entitlement "to shield 'their persons, houses, papers and effects,' U.S. Const. Amdt. 4, from the government's scrutiny." *Id.* at 593. The exclusionary rule remains the mechanism for enforcing these rights "where its remedial objectives are thought most efficaciously served, — that is, where its deterrence benefits outweigh its substantial social costs." *Id.* at 591 (internal citation omitted).

Although all types of evidence are subject to the exclusionary rule, there is a rational limit to the scope of the rule's application. Thus, in *Wong Sun v. United States*, 371 U.S. 471, 487-488 (1963), this Court declined to "hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light *but for* the illegal actions of the police" (emphasis added). Because the exclusionary rule was created to deter the government from performing illegal actions, where there was only an "attenuated connection" between the Fourth Amendment violation and derivative evidence, this Court concluded that the deterrent effect would be negligible and suppression was not warranted. *Id.* Short of that, however, the salutary remedial objectives of the rule are achieved by its application.

In *Hudson*, this Court highlighted the distinction between "cases excluding the fruits of unlawful warrantless searches," *id.* at 593, where constitutional violations can "produc[e] incriminating evidence that could not otherwise be obtained," *id.* at 596, from violations of the knock-and-announce rule, where the probable cause warrant requirement has been met, fully entitling the police to search the premises. Because the

interests violated through noncompliance with the knock-and-announce rule ("protection of human life and limb," *id.* at 594; "protection of property," *id.*; and protection of "those elements of privacy and dignity that can be destroyed by a sudden entrance," *id.*) "have nothing to do with the seizure of the evidence, the exclusionary rule is inapplicable." *Id.*; *see also id.* at 603 ("Today's decision determines only that in the specific context of the knock-and-announce requirement, a violation is not sufficiently related to the later discovery of evidence to justify suppression.") (Kennedy, J., concurring in part and concurring in judgment). By contrast, this Court has recognized that if the interests violated bear "a sufficiently close relationship to the underlying illegality," even "the indirect fruits of an illegal search or arrest should be suppressed." *New York v. Harris*, 495 U.S. 14, 19 (1990).

This Court has held that nearly every category of evidence is subject to suppression as "fruits" or "derivative evidence" of a Fourth Amendment violation, so long as the knowledge of the evidence was obtained by "exploitation" of the initial police illegality. *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920); *Wong Sun*, 371 U.S. at 488; *see, e.g., Sibron v. State of New York*, 392 U.S. 40 (1968) ("fruits" held to include tangible evidence); *Davis v. Mississippi*, 394 U.S. 721, 723-724 (1969) ("fruits" held to include anything of "evidentiary value," specifically evidence of defendant's fingerprints); *United States v. Giordano*, 416 U.S. 505 (1974) ("fruits" held to include words overheard); *Dunaway v. New York*, 442 U.S. 200, 217-19 (1979) ("fruits" held to include statements and confessions); *United States v. Crews*, 445 U.S. 463, 472,

473 n. 18 (1980) ("fruits" held to include photographic and corporeal pre-trial identifications and, in appropriate circumstances, in-court identification testimony).

Moreover, although a defendant must demonstrate a sufficient privacy interest to establish the Fourth Amendment violation itself, *see Rakas v. Illinois*, 439 U.S. 128, 140-141 (1978), no such expectation of privacy need be shown regarding the evidence to be suppressed as a fruit of the primary illegality. Thus, in *Wong Sun*, in adjudicating the case of defendant James Wah Toy, the Court suppressed drugs found at a codefendant's house, in which Toy plainly had no expectation of privacy, as the fruit of Toy's unlawful arrest. 371 U.S. at 484, 486-88. Consistent with the result in *Wong Sun*, there is a consensus among federal circuit courts that the exclusionary rule applies to fruit without regard to whether the defendant has a reasonable expectation of privacy in that fruit. *See United States v. Torres-Ramos*, 536 F.3d 542 (6th Cir. 2008); *United States v. Olivares-Rangel*, 458 F.3d 1104, 1117-19 (10th Cir. 2006); *United States v. Mosley*, 454 F.3d 249, 253 (3rd Cir. 2006); *United States v. Chanthasouxat*, 342 F.3d 1271, 1281 (11th Cir. 2003); *United States v. Ameling*, 328 F.3d 443, 446 n. 3 (8th Cir. 2003); *United States v. Twilley*, 222 F.3d 1092, 1095-1096 (9th Cir. 2000); *United States v. Lyton*, 161 F.3d 1168, 1170 (8th Cir. 1998); *United States v. Jones*, 619 F.2d 494, 498 (5th Cir. 1980); *but cf. United States v. Bowley*, 435 F.3d 426, 430-431 (3rd Cir. 2006); *United States v. Pineda-Chinchilla*, 712 F.2d 942, 943-944 (5th Cir. 1978). *See also* 6 W. LaFave, Search & Seizure §11.3(e), pp. 194, 195, and n. 277 (4th ed. 2004 and Supp. 2007), *cited favorably in Brendlin v. California*, 551 U.S. 249, 259 (2007).

C. Identity-Related Evidence is not Exempted from the Exclusion Remedy.

The New York Court of Appeals would categorically remove all identity-related evidence from the ambit of the exclusionary rule. However, this Court has never exempted such evidence from the exclusionary rule, and there is no justification to do so now.

In *Davis*, 394 U.S. 721, the police, while investigating a rape, arrested Davis without probable cause and obtained his fingerprints, which matched those left at the crime scene and which served as critical evidence against him at trial. *Id.* at 722-723. Citing the nature of fingerprints, the State, and Justice Stewart in his dissenting opinion, urged the Court to create an exception to the exclusionary rule for identification evidence of this variety. *Id.* at 726 and 730. In Justice Stewart's view, fingerprints were "not 'evidence' in the conventional sense that weapons or stolen goods might be." *Id.* at 730. Rather, "[l]ike the color of a man's eyes, his height, or his very physiognomy, the tips of his fingers are an inherent and unchanging characteristic of the man. And physical impressions of his fingerprints can be exactly and endlessly reproduced." *Id.*

The Court, however, emphatically declined to create an exception to the exclusionary rule. *See id.* at 724 ("Fingerprint evidence is no exception to this comprehensive rule."). To the contrary, it held that fingerprints obtained as a product of an unlawful detention were subject to the exclusionary rule:

> True, fingerprints can be distinguished from statements given during detention. They can also be distinguished from articles taken from

> a prisoner's possession. Both similarities and differences of each type of evidence to and from the others are apparent. But all three have the decisive common characteristic of being something of evidentiary value which the public authorities have caused an arrested person to yield to them during illegal detention. If one such product of illegal detention is proscribed, by the same token all should be proscribed.

Id. at 724, adopting *Bynum v. United States*, 262 F.2d 465, 467 (D.C. Cir. 1958). *See also Hayes v. Florida*, 470 U.S. 811 (1985) (reaffirming *Davis* and reiterating that fingerprint evidence remains subject to the exclusionary rule).

In Crews, 445 U.S. 463, the Court again recognized the applicability of the exclusionary rule to identification-related evidence. Specifically, the Court agreed that photographic and lineup identifications obtained as a direct result of defendant's unlawful arrest were suppressible fruits. *Id.* at 472. In addition, a witness's in-court identification of a defendant is subject to suppression if sufficiently tainted by the original illegality. *Id.* at 472-473, 473 n. 18, 473 n. 19. And, in *United States v. Ceccolini*, 435 U.S. 268 (1978), though the Court rejected the defendant's argument that the testimony of a live witness who had observed the defendant should be suppressed in that case as the product of an unlawful police search of physical evidence, it also rejected the Government's argument for a *per se* prohibition against the suppression of witness testimony, recognizing that if the connection between the illegality and the witness's testimony had been sufficiently close, suppression would be warranted. *Id.* at 273-79.

Of course, this Court has long held that the exclusionary rule cannot be used to defeat the jurisdiction of the courts by allowing a criminal defendant himself to become a suppressible "fruit." *See Gerstein v. Pugh*, 420 U.S. 103, 119 (1975); *Frisbie v. Collins*, 342 U.S. 519 (1952); *Ker v. Illinois*, 119 U.S. 436 (1886); *see also INS v. Lopez-Mendoza*, 468 U.S. 1032. A contrary rule would immunize the defendant from prosecution, a remedy going well beyond the interests that the exclusionary rule seeks to protect. *See Crews*, 445 U.S. at 474 ("[R]espondent . . . cannot claim immunity from prosecution simply because his appearance in court was precipitated by an unlawful arrest. An illegal arrest, without more, has never been viewed as a bar to subsequent prosecution, nor as a defense to a valid conviction."). However, as the foregoing discussion indicates, this jurisdictional rule is distinct from whether identity-related evidence is suppressible, and indeed has not prevented the Court from recognizing the applicability of the exclusionary rule to other identity-related evidence – evidence comparable to the DMV records at issue here.

In petitioner's case, the New York state courts relied heavily on this Court's decision in *Lopez-Mendoza* to justify their conclusion that the exclusionary rule does not apply to identity-related evidence – a conclusion not only at odds with the case law discussed above at pp. 24-26 – but also with *Lopez-Mendoza* itself. The *Lopez-Mendoza* decision resolved the cases of two respondents in separate civil deportation proceedings. Both respondents contended that their arrests had violated the Fourth Amendment, but the respondent in the first proceeding, Lopez-Mendoza, did not seek the

suppression of any evidence. *Lopez-Mendoza*, 468 U.S. at 1035. Rather, based on the purportedly illegal arrest, he contended solely that the proceedings against him had to be terminated. *Id.* It was in response to this claim that the Court, citing the *Ker-Frisbie* rule, noted that "the 'body' or identity of a defendant or respondent in a criminal or civil proceeding is never itself suppressible as a fruit of an unlawful arrest." *Id.* at 1039-1040 (citations omitted). Because Lopez-Mendoza had "objected only to the fact that he had been summoned to a deportation hearing following an unlawful arrest" and because "he entered no objection to the evidence offered against him," rejection of his claim was required. *Id.* at 1040.

Viewed in this context, it is clear that the New York courts erred when they relied on this Court's language in *Lopez-Mendoza* to reject petitioner's suppression-of-evidence claim. First, this Court's citations in the relevant portion of *Lopez-Mendoza* to *Gerstein v. Pugh*, 420 U.S. at 119; *Frisbie v. Collins*, 342 U.S. 519, 522 and *United States ex rel. Bilokumsky v. Tod*, 263 U.S. 149, 158 (1923), plainly responded only to Lopez-Mendoza's jurisdictional argument. The Court then removed any doubt on this issue when it stated that the other *Lopez-Mendoza* respondent, Sandoval-Sanchez, who "objected not to his compelled presence at a deportation proceeding, but to evidence offered at that proceeding," 478 U.S. at 1041,[3] had "a more substantial claim" than the purely jurisdictional one raised by

3. Sandoval-Sanchez's claim was that statements and other evidence offered against him at the immigration hearing should have been suppressed as the product of his unlawful, warrantless arrest. *Id.* at 1040.

Lopez-Mendoza, *Id.* at 1040. Indeed, Sandoval-Sanchez lost only because the Court held that the exclusionary rule did not apply to his civil proceeding. *Id.* at 1040-51.

Thus, as the dissenters below recognized, *Lopez-Mendoza*, far from prohibiting the application of the exclusionary rule to all identity-related evidence in criminal proceedings, supports the proposition that the rule applies to such evidence. *Accord United States v. Oscar-Torres*, 507 F.3d 224, 227-30 (4th Cir. 2007); *United States v. Olivares-Rangel*, 458 F.3d 1104, 1111-1112 (10th Cir. 2006); *United States v. Guevara-Martinez*, 262 F.3d 751, 753, 755 (8th Cir. 2001).[4]

D. The DMV Records at Issue are Subject to Exclusion Because they are Directly Related to the Claimed Fourth Amendment Violation.

As a consequence of the stop of his vehicle, the police obtained identifying information from petitioner. They immediately exploited that information to acquire the data in DMV files that his license was suspended. Applying the well-settled principles governing the suppression of unlawfully obtained evidentiary fruits, *Wong Sun*, 371 U.S. 471, there is no question that, "granting establishment of the primary illegality," the evidence at issue here was "come at by exploitation of that illegality," rather than "by means sufficiently

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4. Those Circuit Courts that have interpreted *Lopez-Mendoza* more broadly, *see, e.g., United States v. Bowley*, 435 F.3d 426, 430 (3d Cir. 2006); *United States v. Roque-Villanueva*, 175 F.3d 345, 346 (5th Cir. 1999), have erred in precisely the same way as the New York Court of Appeals majority here.

distinguishable to be purged of the primary taint." *Id.* at 488 (citation omitted). Accordingly, the DMV records are subject to suppression and the New York courts should have so found.

Moreover, the degree of connection between the underlying purpose of the rule that is violated and the evidence acquired as a result has a critical bearing on whether attenuation is present, since the deterrence value served by the exclusionary rule is strongest when that relationship is closest. *Compare Hudson*, 547 U.S. at 593 ("[a]ttenuation also occurs when, even given a direct causal connection, the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained) *with Harris*, 495 U.S. at 19 (even "the indirect fruits of an illegal search or arrest should be suppressed when they bear a sufficiently close relationship to the underlying illegality").

Here, unlike in *Hudson*, the police exploited the illegal stop to gather the very information (identifying information about the status of the driver) that the governing rule in *Prouse* was intended to prohibit; this immediately led to their acquisition of knowledge that petitioner's license was suspended. That information is, accordingly, the suppressible fruit of his unlawful seizure. To hold otherwise would create an incentive for the police to violate the Fourth Amendment by conducting illegal suspicionless car stops, which would be tantamount to sanctioning the random spot checks for license and registration that *Prouse* prohibited. Thus, the remedial objective of deterrence would be well-served by applying the exclusionary rule here.

II. BECAUSE THE POLICE GAINED ACCESS TO PETITIONER'S DMV FILES AS THE DIRECT RESULT OF THEIR ILLEGAL SEIZURE OF PETITIONER, THE "INDEPENDENT SOURCE" DOCTRINE PRESENTS NO LEGITIMATE OBSTACLE TO SUPPRESSION.

It is well-settled that if law enforcement authorities gain knowledge of or access to evidence independently of an illegal search or seizure, the exclusionary rule does not bar its introduction. That doctrine (called "independent source") is inapplicable here. The police gained knowledge of petitioner's status as an unlicensed driver entirely as a result of their illegal seizure of petitioner. The bare existence of that data in DMV computer files had no evidentiary significance absent petitioner's identity as the driver, which was ascertained as a direct result of the Fourth Amendment violation, was entirely unknown to the police who seized petitioner, and would have remained unknown absent the illegal stop. Accordingly, the information was not possessed by law enforcement in any meaningful sense until the police unearthed it as a result of their unlawful conduct, and, for that reason, the independent source doctrine does not apply.

The doctrine was originally articulated by Justice Holmes, writing for the Court in *Silverthorne Lumber Co. v. United States*, 251 U.S. 385. There, the authorities had seized documentary evidence in violation of the Fourth Amendment. *Id.* at 390. After the trial court ordered the evidence returned, the prosecution tried to reacquire it by subpoena. *Id.* at 391. Concluding that

the issuance of the subpoena did not eliminate the Fourth Amendment violation, the Court declared:

> The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all. Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it in the way proposed.

Id. at 392.

The independent source doctrine applies when the police "learn[] of" the evidence by means independent of the Fourth Amendment violation. *Wong Sun*, 371 U.S. at 487. Its purpose is to ensure that the police are "put[] . . . in the same, not a *worse*, position tha[n] they would have been in if no police error or misconduct had occurred. . . . When the challenged evidence has an independent source, exclusion of such evidence would put the police in a worse position than they would have been in absent any error or violation." *Murray v. United States*, 487 U.S. 533, 537 (1988) (*quoting from Nix v. Williams*, 467 U.S. 431, 443 (1984)) (emphasis in original).

The Court's decisions in *Segura v. United States*, 468 U.S. 796 (1984), and *Murray* illustrate that if evidence is acquired in a manner that is truly

independent of the police illegality it is not subject to suppression. In *Segura*, the police illegally entered an apartment without a warrant and secured the premises. However, they did not search the apartment at that juncture and observed no evidence. Instead, they obtained and later executed a search warrant that was based on information "known to the agents well before the illegal entry" and obtained "from sources wholly unconnected with the entry." *Id.* at 814. Since the warrant was untainted by any illegally acquired information, its execution provided a lawful and independent basis for the acquisition of the evidence that it authorized the police to seize.

The Court invoked the independent source doctrine again in *Murray*, in which the facts were similar to *Segura* except that the police had observed some of the evidence as a result of their illegal entry. The Court rejected the petitioner's contention that the discovery of the evidence before the execution of the warrant made the independent source doctrine inapplicable, assuming that, as in *Segura*, the warrant provided an independent, untainted basis for the search. Importantly, the Court noted that the search pursuant to the warrant would not be "a genuinely independent source" of the evidence at issue, "if the agents' decision to seek the warrant was prompted by what they had seen during the initial entry, or if information obtained during that entry was presented to the Magistrate and affected his decision to issue the warrant." 487 U.S. at 542. Thus, it remanded the case to the District Court for resolution of these questions.

Applying these principles here, it is obvious that the independent source doctrine does not govern, since the police did not discover that petitioner's license had been suspended by means independent of the unlawful seizure, such as the untainted warrants authorizing the searches in *Segura* and *Murray*. Instead, the police unearthed that information only by capitalizing on petitioner's unlawful detention. Without that tainted information, the police had no reason to examine the status of petitioner's license.

The New York Court of Appeals' reliance on *Crews*, 445 U.S. 463, to support its conclusion that the DMV records were "public records already in the possession of the authorities," and hence independently obtained, J.A. at 103a, cannot withstand scrutiny.[5] In *Crews*, the police took defendant into custody without probable cause, but before that illegal detention, they "both knew his identity and had some basis to suspect his involvement in the very crimes with which he was charged." *Id.* at 475.[6] After they took his photograph, they released him, and the victim made a photographic identification of him, leading the police to detain him again; the victim then identified him at a lineup and at trial. *Id.* at 466-468. The Court recognized that the victim's photographic and lineup identifications were

5. The Court of Appeals' majority itself acknowledged that the "independent source" portion of its opinion did not alone justify the result, J.A. at 103a, which was based primarily on its view that identity-derived evidence was not subject to the exclusionary rule. J.A. at 101a-103a.

6. They learned this information as a result of a tentative identification by a witness and through brief, noncustodial questioning of petitioner. *Id.*

suppressible fruits of the defendant's initial, unlawful arrest, but held her courtroom identification admissible since it was based on the "mental image of her assailant" formed at the time the crime was committed and was uninfluenced by the inadmissible pre-trial identifications. *Id.* at 472-473, 473 n. 18.

Based on these facts, a plurality[7] of the Court concluded, in language cited by the Court of Appeals in petitioner's case:

> [T]he Fourth Amendment violation in this case yielded nothing of evidentiary value that the police did not already have in their grasp. Rather, respondent's unlawful arrest served merely to link together two extant ingredients in his identification. The exclusionary rule enjoins the Government from benefiting from evidence it has unlawfully obtained; it does not reach backward to taint information that was in official hands prior to any illegality.

Id. at 475.

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7. Two concurring Justices in *Crews* (Justice Powell, joined by Justice Blackmun), who otherwise joined Justice Brennan's opinion for the Court, declined to embrace the portion of Justice Brennan's opinion containing this language, but only because they believed that a defendant can never be immunized from prosecution under Fourth Amendment analysis, a question that they believed Justice Brennan had left open. 445 U.S. at 477. Three other Justices (Justice White, joined by Chief Justice Burger and Justice Rehnquist) agreed with Justices Powell and Blackmun, but would have gone farther, concluding that an in-court identification can never be considered a suppressible fruit of an unlawful arrest. 445 U.S. at 477-79 and fn.*

The admissibility of in-court identification testimony such as that in *Crews* is not at issue here, and we have already established that identity-related evidence, such as the fingerprints at issue in *Davis v. Mississippi* and *Hayes v. Florida* and the out-of-court identifications suppressed in *Crews* itself, is subject to the exclusionary rule. *See, ante*, at pp. 24-26. Unlike a crime victim's independently-derived mental image of a perpetrator, the susceptibility to the exclusionary rule of information that is obtained as a direct result of an unlawful detention is not debatable. Here, only by illegally detaining petitioner did the police ascertain his identity, and then they exploited that knowledge to uncover his unlicensed status. The independent source doctrine operates only to allow the introduction of evidence that is discovered through lawful means.

Moreover, unlike in *Crews*, we do not seek to exclude evidence "that was in official hands prior to any illegality." The information in petitioner's DMV file that petitioner did not have a valid driver's license was not "in official hands" in any meaningful sense. There was no investigation into petitioner's driving records before the police stopped his vehicle. Those records, by themselves, had no evidentiary value. They attained significance only after the police learned, by exploiting their unlawful stop, that petitioner was driving the car. Hence, it was not derived from a source independent of the Fourth Amendment violation; indeed, its discovery was made possible by the violation. *See Olivares-Rangel*, 458 F.3d at 1120. Whereas in *Crews*, "the toxin . . . was injected only after the evidentiary bud had blossomed," 445 U.S. at 471, in this case the toxin injected by the unlawful stop *enabled* the evidentiary bud to "blossom,"

rendering the independent source doctrine inapplicable and requiring the suppression of the DMV file information as poisoned fruit.

Finally, the suppression of the DMV file information will not "put the police in a worse position than they would have been in absent any error or violation." *Murray*, 487 U.S. at 537. The police would simply be unable to use the evidence they discovered by their illegal conduct. The operation of the exclusionary rule would not bar the police from prosecuting petitioner for unlicensed driving on the occasion at issue if they obtained evidence that he was driving without a license through means independent of the unlawful stop. Moreover, if the police stopped petitioner legally on another occasion, they could legitimately gain access to the DMV database, and if his license had not been reinstated, they could use that information to prosecute him for unlicensed driving.

For all of these reasons, the application of the exclusionary rule to the police acquisition of petitioner's DMV file information cannot legitimately be defeated by operation of the independent source doctrine.

III. BECAUSE A RANDOM, BASELESS CAR STOP IS THE TYPE OF DELIBERATE POLICE MISCONDUCT THAT THE EXCLUSIONARY RULE DETERS MOST EFFECTIVELY AND BECAUSE THE SOCIAL COSTS OF APPLYING THE EXCLUSIONARY RULE TO THE DMV RECORDS IN PETITIONER'S CASE DO NOT DIFFER FROM THOSE ARISING FROM THE RULE'S GENERAL APPLICATION IN CRIMINAL CASES, EXCLUSION IS THE APPROPRIATE REMEDY HERE.

Although the Fourth Amendment "contains no provision expressly precluding the use of evidence obtained in violation of its commands," *Arizona v. Evans*, 514 U.S. 1, 10 (1995), this Court's decisions "establish an exclusionary rule that, when applicable, forbids the use of improperly obtained evidence at trial." *Herring v. United States*, 129 S. Ct. 695, 699 (2009). "[T]he continued operation of the exclusionary rule, as settled and defined by [this Court's] precedents, is not in doubt." *Hudson*, 547 U.S. at 603 (Kennedy, J., concurring in part and concurring in judgment).

Nonetheless, application of the exclusionary rule "is not an automatic consequence of a Fourth Amendment violation." *Herring*, 129 S. Ct. at 698. Rather, "the question turns on the culpability of the police and the potential of exclusion to deter wrongful police conduct." *Id.* "To trigger the exclusionary rule, the police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system." *Id.* at 702. "The pertinent analysis of deterrence and

culpability is objective, not an 'inquiry into the subjective awareness of arresting officers.'" *Id.* at 703 (citations omitted).

When police conduct is sufficiently deliberate that exclusion can meaningfully deter it, the Court balances the deterrent effect against the negative consequences that result from application of the rule. Thus, this Court applies the rule "'where its remedial objectives are thought most efficaciously served,'" *Hudson*, 547 U.S. at 591 (quoting *United States v. Calandra*, 414 U.S. 338, 348 (1974)) – that is, "where its deterrence benefits outweigh its 'substantial social costs,'" *Pennsylvania Bd. of Probation and Parole v. Scott*, 524 U.S. 357, 363 (1998) (quoting *United States v. Leon*, 468 U.S. 897, 907 (1984)).

A. Suppressing the Introduction of DMV Records Accessed as the Result of Illegal Automobile Stops would, as in Analogous Situations where the Exclusionary Rule is Routinely Applied, Meaningfully Deter the Police from Intruding on a Driver's Clearly Protected Fourth Amendment Interests.

The deterrent effect of the exclusionary rule is at the heart of the balancing test that determines the scope of the rule's application. Indeed, because the exclusionary rule is not an individual right, but a remedy directed at broader societal enforcement of constitutional protections, it applies only where it "'result[s] in appreciable deterrence.'" *Leon*, 468 U.S. at 905-906 (quoting *United States v. Janis*, 428 U.S. 433, 454 (1976)). When this Court has declined to extend the

reach of the exclusionary rule, central to its determination has been the conclusion that the proposed expansion of the rule would less effectively deter Fourth Amendment violations than in situations where the exclusionary rule has traditionally applied. *See Herring*, 129 S. Ct. at 700 ("we have focused on the efficacy of the rule in deterring Fourth Amendment violations"). Thus, it must be clear that the proposed application will have a significant effect in deterring the type of Fourth Amendment violation involved. *See Evans*, 514 U.S. at 15 (in declining to apply exclusionary rule to police officials who reasonably relied on mistaken information in court's database, the Court deemed "most important [that] there [was] no basis for believing that application of the exclusionary rule in [those] circumstances" would have any significant effect in deterring the errors).

In the paradigmatic exclusionary rule situation – suppressing physical evidence discovered incident to a warrantless arrest lacking probable cause, *see, e.g.*, *Wong Sun*, 371 U.S. at 484-88 – the remedy of exclusion nullifies a strong incentive on the part of police. One of a police officer's primary responsibilities is to discover evidence of criminality that can be used to prosecute those who break the law. If unconstitutional seizures and searches could lead directly to admissible evidence, the police would have a powerful incentive to engage in this illegal conduct. *See Hudson*, 547 U.S. at 596 ("the value of deterrence depends upon the strength of the incentive to commit the forbidden act").

Here, the deterrent effect is at the same high level as in the traditional exclusionary rule situation. The

police have a strong interest in promoting safety on the roadways, and to accomplish that goal, the police have a "vital interest in ensuring that only those qualified to do so are permitted to operate motor vehicles." *Prouse*, 440 U.S. at 658. If police could arbitrarily stop an automobile operating on a roadway and detain the driver to check the status of his or her license, they would have a strong incentive to do so. In those cases where the police discovered the driver to be unlicensed, they would accomplish the twin goals of removing an unqualified motorist from the roadways and of producing evidence of criminality that could be used to prosecute the motorist. This strong incentive to circumvent the protections of the Fourth Amendment is the same as the incentive the police have to discover evidence of criminality in the typical exclusionary rule scenario.

Indeed, were the exclusionary rule not applied here, the police would have a strong incentive to engage in the practice squarely condemned by this Court in *Prouse* as violative of the Fourth Amendment – the arbitrary, suspicionless stop of a motorist to check license and registration. 440 U.S. at 659. With this incentive unchecked, the police would be substantially undeterred from the wholesale evasion of the protections announced in *Prouse*. Meaningful enforcement of *Prouse* is all the more important in light of this Court's recognition in *Whren v. United States*, 517 U.S. 806 (1996), that the objective standard of probable cause protects motorists from unwarranted police violations of the Fourth Amendment, rather than an evaluation of the subjective motivations of the police officers conducting the automobile stop. The application of the exclusionary rule to DMV records accessed as a result of an illegal car

stop would provide the most efficacious method of enforcing these fundamental objective constitutional protections.

B. Arbitrary, Suspicionless Car Stops are the Type of Flagrant Police Misconduct that Merit Application of the Exclusionary Rule.

As a companion to deterrence, this Court focuses on the culpability of the police actions that are potentially subject to the exclusionary rule. *Herring*, 129 S. Ct. at 701. "The extent to which the exclusionary rule is justified by . . . deterrence principles varies with the culpability of the law enforcement conduct." *Id.*; *see also Brown v. Illinois*, 422 U.S. 590, 610-611 (1975) (Powell, J., concurring in part) ("[T]he deterrent value of the exclusionary rule is most likely to be effective" when "official conduct was flagrantly abusive of Fourth Amendment rights."). As the Court stated in *Leon*, "an assessment of the flagrancy of the police misconduct constitutes an important step in the calculus" of applying the exclusionary rule. 468 U.S. at 911.

This Court's emphasis on the presence or absence of flagrant police misconduct has emerged over the course of several decisions in which the Court declined to extend the reach of the exclusionary remedy. In *Leon*, the Court held that the exclusionary rule did not apply if the police acted in "objectively reasonable reliance" on a judicially authorized search warrant that was subsequently invalidated. 468 U.S. at 922. Shortly thereafter, the Court elected not to apply the exclusionary rule to warrantless administrative searches performed in good-faith reliance on a statute

later declared unconstitutional. *Illinois v. Krull*, 480 U.S. 340, 349-350 (1987). Then, in *Evans*, the Court applied the "good-faith" rationale to police who reasonably relied on information in a court's database that mistakenly indicated that an arrest warrant was outstanding. 514 U.S. 1. Most recently, in *Herring*, this Court cited the absence of deliberate misconduct as "crucial to [its] holding" declining to apply the exclusionary rule where an officer reasonably believed, based on existing departmental records, that there was an outstanding arrest warrant, but that belief turned out to be mistaken because of a negligent bookkeeping error by another police employee. 129 S. Ct. at 700.

The unifying theme behind these cases is that police conduct that is not objectively culpable, but rather arises from good-faith reliance on existing records or on judicial or legislative authorization later found infirm, does not warrant application of the exclusionary rule. *Herring* ultimately rests explicitly on the important distinction between the isolated instance of negligent record keeping at issue there and "deliberate, reckless or grossly negligent conduct, or in some circumstances recurring or systemic negligence," to which the exclusionary rule appropriately applies. 129 S. Ct. at 702. In distinguishing between the merely negligent conduct before it and the more culpable scenarios to which the exclusionary rule rightly applies, the Court, in *Herring*, pointed to the classic examples of *Weeks v. United States*, 232 U.S. 383 (1914) and *Mapp v. Ohio*, 367 U.S. 643 (1961). In both *Weeks* and *Mapp*, the police who interacted with the defendants acted not in good-faith reliance on prior authorizations, but in direct violation of the protections of the Fourth Amendment.

This Court concluded that an error like the one in *Herring* that arises from nonrecurring and attenuated negligence is far removed from the "core concerns" that led the Court to adopt the rule in cases like *Weeks* and *Mapp*. 129 S. Ct. at 702.

Here, petitioner's motion to suppress in New York County Supreme Court alleged that the police, without justification, stopped petitioner while he was driving his car, ordered him to turn over his driver's license, and then conducted a computer check of petitioner's DMV records. In response, the State never suggested that the police officers involved had had prior dealings with petitioner or, in sharp contrast to their counterparts in *Leon*, *Evans* or *Herring*, had acted in good-faith reliance on a warrant or other existing records in making the stop in the first place. The motion court denied petitioner's motion without holding a hearing to assess the veracity of petitioner's allegations, concluding that the DMV records could never constitute evidence subject to suppression under a fruit-of-the-poisonous-tree analysis. Thus, in deciding petitioner's motion to suppress, the motion court assumed petitioner's allegations to be true. And the New York State appellate courts similarly assumed petitioner's allegations to be true for the purpose of resolving the suppression issue. Indeed, because the New York State courts concluded that the DMV records could never be the fruit of the poisonous tree, the records would not be suppressible under the New York rule regardless of the flagrancy of the police misconduct.

Petitioner's allegations describe police conduct that is within the "core concerns" that led this Court to adopt

the exclusionary rule. *Herring*, 129 S. Ct. at 702. The unjustified stop of a vehicle for the purpose of checking a motorist's license is exactly the scenario held to violate the Fourth Amendment in *Prouse*. Thus, as in both *Weeks* and *Mapp*, unlike the good-faith reliance cases that culminated with *Herring*, the police conduct at issue here constituted the type of constitutional violation to which the exclusionary rule paradigmatically applies. And importantly, under the approach of the New York state courts, the DMV records would not be suppressible even in the face of avowedly deliberate, systemic violations of the applicable Fourth Amendment protections.

C. The Privacy Interests Implicated by Arbitrary, Suspicionless Car Stops are Substantial.

The magnitude of the privacy interest violated by police misconduct is also relevant to the overall balancing of the consequences of applying the exclusionary rule. As this Court discussed in *Prouse*, individuals have a strong privacy interest when driving their cars:

> Automobile travel is a basic, pervasive, and often necessary mode of transportation to and from one's home, workplace, and leisure activities. Many people spend more hours each day traveling in cars than walking on the streets. Undoubtedly, many find a greater sense of security and privacy in traveling in an automobile than they do in exposing themselves to pedestrian or other modes of travel. Were the individual subject to

> unfettered governmental intrusion every time he entered an automobile, the security guaranteed by the Fourth Amendment would be seriously circumscribed.

440 U.S. at 662-663.

When the police engage in an arbitrary, suspicionless car stop, they engage in a significant intrusion on that privacy interest. Random unjustified seizures visit a "physical and psychological intrusion" upon the occupants of a vehicle. *Prouse*, 440 U.S. at 657. These stops have the potential to "create substantial anxiety" and "interfere with freedom of movement." *Id.*

D. The Social Costs of Applying the Exclusionary Rule to the DMV Records in Petitioner's Case Do Not Differ From Those Arising From the Rule's General Application in Criminal Cases.

To justify application of the exclusionary rule, "the benefits of deterrence must outweigh the costs." *Herring*, 129 S. Ct. at 700 (citation omitted). The cost of applying the rule in any case is substantial: "there is the loss of often probative evidence and all of the secondary costs that flow from less accurate or more cumbersome adjudication." *Lopez-Mendoza*, 468 U.S. at 1041; *see Herring*, 129 S. Ct. at 701. Nonetheless, the "general rule in a criminal case is that . . . evidence obtained as a result of an unlawful warrantless arrest [is] suppressible if the link between the evidence and the unlawful conduct is not too attenuated." *Lopez-Mendoza*, 468 U.S. at 1040-1041. Accordingly, in

weighing the costs of applying the rule against the benefits in particular situations, the Court has focused on costs beyond those endemic to the operation of the rule itself. *See Lopez-Mendoza*, 468 U.S. at 1046 (declining to apply rule in circumstances where its costs were "unusual and significant"); *Hudson*, 547 U.S. at 595 (same, where the rule's contemplated application would have resulted in "considerable" costs *"[i]n addition* to the grave adverse consequences that the exclusion of relevant incriminating evidence always entails") (emphasis added).

Application of the exclusionary rule to the DMV records in petitioner's case implicates no social costs beyond those that inevitably ensue whenever the rule operates. First, unlike in *Lopez-Mendoza*, where the Court refused to apply the rule to "continuing violations of the law," 547 U.S. at 1046, petitioner's case involves a traditional single-act offense in which the rule would not function to insulate future misconduct. Second, in contrast to the violations of the knock-and-announce rule at issue in *Hudson*, application of the exclusionary rule here would not engender suppression litigation unfamiliar to the New York courts and would neither create additional dangers to officers in the field nor foster the destruction of evidence. *Hudson*, 547 U.S. at 595-596. Finally, suppression of the DMV records in cases like petitioner's would not unduly hamstring the State, which would retain an array of alternative weapons in its efforts to enforce the traffic laws against unlicensed drivers. *Prouse*, 440 U.S. at 659-63. For all of these reasons, application of the exclusionary rule is appropriate.

1. Aggravated Unlicensed Operation of a Motor Vehicle, the Offense With Which Petitioner was Charged, is Not a Continuing Crime.

In *Lopez-Mendoza*, the Court declined to extend the exclusionary rule to deportation proceedings 468 U.S. at 1042. In addition to identifying the differences between these civil matters and traditional criminal prosecutions, the Court, in weighing the social costs of applying the rule, noted that the respondent there was "a person whose unregistered presence in this country, without more, constitutes a crime." *Id.* at 1043-45, 1047. Because his "release within our borders would immediately subject him to criminal penalties," the exclusionary rule's application in that case engendered costs "unique to continuing violations of the law." *Id.* at 1046-1047. Specifically, applying the exclusionary rule to continuing offenses "would require courts to close their eyes to ongoing violations of the law." *Id.* at 1046. Noting that it "had never before accepted costs of this character" as the price of an exclusionary remedy, the Court concluded that the "constable's blunder may allow the criminal to go free, but we have never suggested that it allows the criminal to continue the crime." *Id.* at 1047.

These costs are not implicated in petitioner's case because the offense of which he was accused – first-degree aggravated unlicensed operation of a motor vehicle, *see* N.Y. Vehicle & Traffic Law §511 (3)(a)(ii) – is a single act, rather than a continuing offense. Specifically, petitioner did not commit the offense at issue merely because he was a person whose driver's license

had been suspended. Rather, it was only petitioner's single act of driving a car at 7:40 p.m. on January 1, 2005, that triggered liability under Vehicle & Traffic Law §511 (3)(a)(ii). Beyond that single act, his continuing status as a person with a suspended driver's license did not constitute the charged offense.

For that reason, application of the exclusionary rule to the DMV records in petitioner's case would be no different from application of the rule to contraband or evidence in any other prosecution for a single-act offense. Specifically, under petitioner's theory, if he established the illegality of the traffic stop at a suppression hearing, the State would, at most,[8] be precluded from introducing his DMV records to establish his unlawful operation of his vehicle at the time that the police stopped him on January 1, 2005. If the police lawfully stopped petitioner while he was driving on a subsequent occasion (and petitioner's license remained suspended), there would be absolutely no impediment to the introduction of his DMV records to establish his unlawful operation of the vehicle at that time.

Thus, affording petitioner an exclusionary remedy here would in no way "require courts to close their eyes to ongoing violations of the law." *Lopez-Mendoza*, 468 U.S. at 1046. To the contrary, like offenders who escape

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8. If, at the suppression hearing, the State presented evidence independent of that derived from the unlawful stop establishing that petitioner was driving on the occasion in question, then there would be no Fourth Amendment violation and the DMV records would be admissible. *See, ante*, at p. 36.

liability for ordinary possessory crimes because courts suppress the weapons or the narcotics that police unlawfully recover from them, petitioner would be fully subject to prosecution should he be stopped again for driving with a suspended license. Assuming the legality of that stop, his DMV records could serve as the centerpiece of the case against him. Hence, unlike in *Lopez-Mendoza* or other cases involving continuing crimes, the cost of a blunder by the constable in situations like petitioner's is one for which an exclusionary remedy has long been tolerated.

2. The Suppression Issues Presented in Petitioner's Case are Identical to those Routinely Resolved by Courts on a Daily Basis.

In *Hudson*, the Court weighed the social costs of an exclusionary remedy to redress police violations of the Fourth Amendment knock-and-announce rule and determined that those costs were too high. *Hudson*, 547 U.S. at 594-99. First among the cited costs, the Court noted that a newly crafted suppression remedy "would generate a constant flood of alleged failures to observe the rule," causing courts "to experience as never before the reality" that suppression litigation can be complex and time consuming. *Id.* at 595. Moreover, unlike traditional suppression claims in which the existence of a violation can be easily ascertained, purported departures from the knock-and-announce rule "would be difficult for a trial court to determine and even more difficult for an appellate court to review." *Id.* This potential explosion of unfamiliar suppression litigation was a significant factor underlying *Hudson*'s refusal to

apply the exclusionary rule. *See also Lopez-Mendoza*, 468 U.S. at 1048 (citing, in support of its refusal to extend the exclusionary rule to civil deportation proceedings, the facts that "neither the hearing officers nor the attorneys participating in those hearings are likely to be well versed in the intricacies of Fourth Amendment law" and that "invocation of the exclusionary rule might significantly change and complicate the character of these proceedings").

No such costs would ensue if the exclusionary rule were applied to petitioner's case. Hearing and appellate courts in criminal cases in all jurisdictions already routinely examine suppression claims hinging on whether the police have stopped a vehicle in violation of the Fourth Amendment. Prosecutors and defense attorneys litigate such claims with great frequency day in and day out. Moreover, unlike the murky knock-and-announce claims described in *Hudson*, 547 U.S. at 595, automobile-stop cases do not, as a rule, present issues of particular complexity.

Specifically, an officer's stop of an automobile is reasonable so long as the police have probable cause to believe that a traffic violation has occurred or reasonable suspicion to believe that an occupant has engaged in unlawful activity. *Whren*, 517 U.S. at 810; *see Prouse*, 440 U.S. at 661, 663. The inquiry is a narrow, straightforward and objective one: difficult-to-resolve issues such as "the actual motivations of the individual officers involved" or whether a "reasonable officer in the same circumstances would have made the stop" play no role in the determination of "constitutional reasonableness." *Id.* at 813-814. Accordingly, application

of the exclusionary rule to DMV records in cases such as petitioner's would require only that courts resolve issues that they already adjudicate in brief and straightforward proceedings on a daily basis.

3. Application of the Exclusionary Rule to Cases Like Petitioner's Would Neither Create Additional Dangers for Law Enforcement Personnel Nor Foster the Destruction of Evidence.

In declining to extend the exclusionary rule to Fourth Amendment knock-and-announce violations, the *Hudson* Court concluded that the impact of a newly created suppression remedy "would be officers' refraining from timely entry after knocking and announcing." *Hudson*, 547 U.S. at 595. Such hesitation, the natural product of law enforcement efforts to conform to an expansion of the exclusionary rule, could yield "preventable violence against officers in some cases, and the destruction of evidence in many others." *Id.* (citation omitted). Such costs weighed heavily against application of the exclusionary rule in *Hudson*.

No such deleterious consequences would result if the exclusionary rule were applied to petitioner's DMV records. The Fourth Amendment inquiry in petitioner's case would be exactly the same as in all other automobile stop cases: whether the authorities had probable cause or reasonable suspicion to pull over the vehicle. *Whren*, 517 U.S. at 810; *Prouse*, 440 U.S. at 661, 663. Law enforcement officers in New York are well familiar with these requirements as they already apply full force to car stop suppression hearings involving other

evidentiary fruits. While the refusal to apply the exclusionary rule here might well encourage officers to risk suspicionless, warrantless license checks in violation of *Prouse*, 440 U.S. at 663, *see, ante*, at p. 40, application of the rule will impose no Fourth Amendment constraints on police conduct beyond those already mandated under existing jurisprudence. Accordingly, in sharp contrast to *Hudson*, a suppression remedy for petitioner will pose no increased risk to officer safety or to the integrity of evidence.

E. As the *Prouse* Court Recognized, Because the Authorities Have Many Tools at their Disposal to Crack Down on Unlicensed Drivers, There is No Reason to Forgo the Traditional Exclusionary Remedy When a Police Stop Violates the Fourth Amendment.

"The States have a vital interest in ensuring that only those qualified to do so are permitted to operate motor vehicles." *Prouse*, 440 U.S. at 658. This Court decided long ago, however, that there are many options besides suspicionless stops to vindicate this important interest, *Prouse*, 440 U.S. at 656-657, 659-61, and that, "[g]iven the alternative mechanisms available, both those in use and those that might be adopted," there was insufficient justification for exempting road stops such as the one in petitioner's case from Fourth Amendment review. *Id.* at 659.

In *Prouse*, for example, the Court expressly recognized the continued viability of roadside weigh stations and inspection checkpoints. *Id.* at 663, n.26. Such permanent checkpoints can play a significant role

in locating drivers operating without proper credentials. In addition, the *Prouse* Court noted with approval the use of other fixed checkpoints designed by law enforcement for specific purposes. *Id.* at 656-57. *See United States v. Martinez-Fuerte*, 428 U.S. 543, 546 (1976) (upholding checkpoint inquiring as to motorists' immigration status). In the years following *Prouse*, the Court has upheld other similar law enforcement techniques. *See Illinois v. Lidster*, 540 U.S. 419, 427-428 (2004) (upholding checkpoint directed at obtaining information regarding a recent area hit-and-run accident); *Michigan Department of State Police v. Sitz*, 496 U.S. 444, 448 (1990) (upholding sobriety checkpoints aimed at promoting safety on roadways). These tactics as well serve as valuable tools for detecting unlicensed drivers. *See City of Indianapolis v. Edmond*, 531 U.S. 32, 37-38, 39 (2000) (noting *Prouse*'s suggestion that "a similar type of roadblock with the purpose of verifying drivers' licenses and vehicle registrations would be permissible").

Finally, *Prouse* recognized that the "foremost method of enforcing traffic and vehicle safety regulations" is "acting upon observed violations." *Prouse*, 440 U.S. at 659. Traffic stops such as these, the Court noted, "occur countless times each day" and, during such encounters, "licenses and registration papers are subject to inspection and drivers without them will be ascertained." *Id.* Indeed, because "drivers without licenses are presumably less safe drivers whose propensities may well exhibit themselves," relying on observed traffic violations to root them out is both effective and efficient. *Id.*

In petitioner's case, the State asserted that an observed traffic violation led to the discovery that petitioner's license had been suspended. Petitioner denied committing any traffic violation, and, in resolving the case, the New York courts accepted that denial as true. The rule adopted by the Court of Appeals majority, however, entirely exempts the State in this and all similar cases from the requirement that it establish the existence of a violation justifying the car stop. As *Prouse* also recognizes and as subsequent decisions confirm, there exists an array of viable law enforcement alternatives to suspicionless license checks. For this reason as well, there is no justification for New York's refusal to apply the exclusionary rule to the stop in petitioner's case.

* * *

A random, baseless car stop is the paradigmatic type of deliberate police misconduct that the exclusionary rule was designed to deter. And petitioner's DMV records were "come at by exploitation" of the claimed illegality. *Wong Sun*, 371 U.S. 471. This Court's precedents demonstrate that the identity-related nature of those records do not put them beyond the reach of the exclusionary rule. Carving out an identity-derived records exception to the exclusionary rule would create unwise incentives for police and invite disregard for the Constitution.

CONCLUSION

For the foregoing reasons, the judgment of the New York Court of Appeals should be reversed.

Respectfully submitted,

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